

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
	:	
of	:	
	:	
ACE-JAX WATERPROOFING CORP.	:	DETERMINATION
	:	DTA NO. 818470
for Redetermination of Deficiencies or for Refund of New	:	
York State Personal Income Tax under Article 22 of the	:	
Tax Law for the Period February 12, 1993 through	:	
December 30, 1994.	:	

Petitioner, Ace-Jax Waterproofing Corp., 1241 East 14th Street, Brooklyn, New York 11230-4803, filed a petition for redetermination of deficiencies or for refund of New York State personal income tax under Article 22 of the Tax Law for the period February 12, 1993 through December 30, 1994.

A small claims hearing was held before James Hoefer, Presiding Officer, at the offices of the Division of Tax Appeals, 400 Oak Street, Garden City, New York on August 23, 2002 at 9:15 A.M. Petitioner appeared by Stephen E. Zimmerman, CPA. The Division of Taxation appeared by Barbara G. Billet, Esq. (Josie Green).

Since neither party herein elected to file a post-hearing brief, the three-month period for the issuance of this determination commenced as of the date the hearing was held.

ISSUE

Whether petitioner's application for amnesty made pursuant to the 1996 tax amnesty program was properly denied by the Division of Taxation on the ground that petitioner had previously been granted amnesty pursuant to the 1985/86 tax amnesty program and was thus not eligible to participate in the 1996 tax amnesty program.

FINDINGS OF FACT

1. For the period February 12, 1993 through December 30, 1994 petitioner herein, Ace-Jax Waterproofing, Corp., did not file and remit or did not timely file and remit to the Division of Taxation (“Division”) the New York State income tax it had withheld from its employees’ wages.

2. Based on petitioner’s failure to timely remit the New York State income tax withheld from employee wages, the Division issue a total of eight assessments, one for each quarterly period in 1993 and 1994, assessing any unpaid tax, plus interest and penalties.

3. On some unknown date between November 1, 1996 and January 31, 1997, petitioner filed with the Division an application for amnesty seeking to have the penalties waived with respect to the eight assessments referred to in Finding of Fact “2”. On February 10, 1997, the Division issued a Statement of Amnesty Account to petitioner denying its request for amnesty for the eight quarters at issue herein for the following reason:

You are not eligible for amnesty for this type tax because you derived benefits for this same type tax under a previous tax amnesty program (1985/86 or 1994). Under the terms of the tax amnesty legislation, amnesty cannot be granted for this tax. Penalties have not been waived and you will receive a separate bill for any tax, interest and penalty now due.

4. Petitioner disagreed with the Division’s denial of its request for amnesty claiming that it had no record of ever applying for amnesty under the 1985/86 or 1994 tax amnesty programs. Petitioner eventually protested the Division’s denial of its amnesty application by filing a Request for Conciliation Conference with the Division’s Bureau of Conciliation and Mediation Services (“BCMS”). A conciliation conference was held on December 7, 2000 and on February 2, 2001 BCMS issued a Conciliation Order wherein the Division’s denial of petitioner’s amnesty application was upheld and the eight assessments in dispute were therefore sustained. Petitioner

protested the Conciliation Order by filing a petition with the Division of Tax Appeals and this proceeding subsequently ensued.

5. Petitioner has consistently maintained that it has no record of ever applying for amnesty prior to the application at issue in this proceeding. In its petition for redetermination petitioner states that:

The Commissioner for reasons beyond our understanding claims that amnesty was granted to the taxpayer for the 1985/1986 period. But the taxpayer never applied for any type of amnesty or amnesty benefits under the 1985/1986 program. . . . Now the Commissioner claims that the taxpayer is not eligible for the amnesty program. Why the New York State Tax Commissioner has these facts in his records is beyond our comprehension. How can you receive what you do not apply for? Neither the Commissioner nor the taxpayer has a copy of any previous amnesty application.

6. The Division maintains that petitioner filed three amnesty applications with respect to withholding taxes under the 1985/86 tax amnesty program and that all three applications were granted on October 29, 1986. While the Division readily admits that it cannot produce copies of the three amnesty applications allegedly filed by petitioner with respect to the 1985/86 tax amnesty program, it asserts that its computer records provide sufficient proof that petitioner applied for and was granted amnesty under the 1985/86 tax amnesty program. The following table represents a summary of the information contained in the Division's computer records with respect to the alleged amnesty applications made by petitioner under the 1985/86 tax amnesty program:

Amnesty Application #	Date	Amount Paid	Assessment Numbers
A123000094	2-04-86	\$5,248.00	BL807722; BL807723
A013000616	3-19-86	\$373.55	BL807724 thru BL807727
A012701050	4-28-86	\$670.36	BL 807728; BL807730; BL807731

7. Petitioner maintains that the Division's computer records are insufficient to establish that it had applied for and received amnesty under the 1985/86 tax amnesty program and that without the actual signed applications it cannot be found that such applications were in fact filed.

CONCLUSIONS OF LAW

A. Section 265 of chapter 309 of the Laws of 1996 established a three-month amnesty program effective November 1, 1996 through January 31, 1997 for all eligible taxpayers owing, among other taxes, New York State personal income tax imposed under Article 22 of the Tax Law for taxable periods ending on or before December 31, 1994. Said tax amnesty program provided, *inter alia*, that an eligible taxpayer who files an application for amnesty and makes payment of the taxes and interest due shall have all applicable penalties waived. As relevant to this proceeding section 265(f) of chapter 309 of the Laws of 1996 provides as follows:

Amnesty shall not be granted to a taxpayer, where such taxpayer received any benefit under the amnesty program established either under chapter 66 of the laws of 1985 (as amended) or chapter 170 of the laws of 1994, with regard to the tax with respect to which such benefit was received under any such prior amnesty program.

B. Except in certain circumstances not present in the instant matter, Tax Law § 689(e) places the burden of proof on petitioner. Petitioner has failed to adduce any documentary evidence to support its position nor did anyone appear on its behalf to offer testimony. Petitioner's entire case rests solely on unsworn statements to the effect that it has no record of

ever filing an amnesty application prior to the application filed for the 1996 tax amnesty program.

The Division, on the other hand, has adduced ample documentary evidence to show that petitioner applied for and was granted amnesty under the 1985/86 tax amnesty program with respect to New York State income taxes imposed under Article 22 of the Tax Law. Although the Division could not produce the actual applications filed by petitioner for the 1985/86 tax amnesty program, I find this insignificant since more than 10 years has expired between the date said applications were filed and the date this controversy arose. Moreover, the Division's computer records regarding petitioner's 1985/86 tax amnesty applications contain specific and detailed information which adequately supports that said applications were in fact filed.

C. The petition of Ace-Jax Waterproofing, Corp. is denied and the Division's denial of petitioner's application for amnesty pursuant to the 1996 tax amnesty program with respect to New York State income taxes imposed under Article 22 of the Tax Law and its imposition of penalties pursuant to the eight assessments in dispute are both sustained.

DATED: Troy, New York
October 10, 2002

/s/ James Hoefer
PRESIDING OFFICER